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Supreme Court of the United States

October Term, 1959

No. 796

BEATRICE LYONS, temporary administratrix with limited authority of the goods, chattels and credits of JOHN LYONS, deceased,

Petitioner,

against

UNITED FRUIT COMPANY, AGENCIA MARITIMA HONDUREMA, S. A., and EMPRESSA HONDUREMA DE VAPORES, S. A.,

Respondents,

and

AGENCIA MARITIMA HONDUREMA, S. A., and EMPRESSA HONDUREMA DE VAPORES, S. A.,

Third-Party Plaintiffs,

against

BETHLEHEM STEEL COMPANY,

Third-Party Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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of Counsel.

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BETHLEHEM STEEL COMPANY,

Third-Party Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on December 18, 1959.

Opinions Below

The opinion of the United States District Court for the Southern District of New York dated February 4, 1959 is reported at 170 F. Supp. 261.

The opinion of the Court of Appeals is reported at 273 Fed. 2d 317.

Jurisdiction of This Court

The judgment of the Court of Appeals was entered on December 18, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Does a Trial Court have the authority to nullify the effects of the provisions of Rule 51 of the Federal Rules of Civil Procedure by judicial opinion?

2. Has there been such radical departure from the well-established and universally accepted law as to require this Court to reiterate judicial opinion in construing such Rule 51 of the Federal Rules of Civil Procedure that in the absence of any exception by a party, the jury is bound to accept the instructions of the court as "the law of the case"?

3. Is there a conflict of decisions between the decision of the Court below and the decisions of other appellate courts of federal and state jurisdiction that should be resolved by this court with reference to the duty of a trial court to strike out the answers to questions of a special verdict which are contrary to "the law of the case" and contrary to the applicable law and undisputed facts?

4. Is Rule 58 of the Federal Rules of Civil Procedure directory or mandatory?

(a) Does such Rule 58 permit a trial court to order judgment in favor of a defendant on a special verdict of a jury when the answer of the jury to the necessarily basic question of such verdict is contrary to the "law of the case" and contrary to the instructions of the court as to such specific question?

(b) Does such Rule 58 permit a trial court to substitute its personal interpretation of the questions and answers of a special verdict, when such interpretation is contrary to the findings of the jury itself, contrary to the "law of the case" and contrary to the prior instructions of the court itself?

5. Is Rule 49 of the Federal Rules of Civil Procedure directory or mandatory? Is there such an inconsistency between the answers to the questions of the special verdict which must be resolved in favor of the plaintiff under the doctrine of the "law of the case" or must a new trial be ordered?

Reasons for Granting the Writ

The trial court and the court below have refused to comply with Rules 51, 58 and 49 of the Federal Rules of Civil Procedure and have nullified the purposes and effects of such rules by judicial opinion.

The trial court and the court below arbitrarily and contrary to such Rules 51, 58 and 49 of the Federal Rules of Civil Procedure have attempted to substitute and have substituted the personal interpretation of the trial court to the questions and answers of a special verdict when such interpretation is contrary

(a) to the findings of the jury;

(b) to the "law of the case" established by the trial court itself and counsel for defendant and third party defendant;

(c) to the prior instructions of the court itself;

(d) to the applicable law.

The trial court and the court below have arbitrarily refused to consider other and further relevant facts (not mentioned in the opinion of the court below) which demand that judgment be entered in favor of the petitioner on the special verdict.

The increasing use of special verdicts by trial courts and the absence of decisions of this court with reference to the ultimate effect of the questions and answers of special verdicts together with the application and legal effect of the instructions of a trial court to each question of such a verdict require that this court clarify the law for the future guidance of Federal Courts and the attorneys trying cases in such courts.

Statement of the Case

History

Petitioner, an iron worker employed by the third party defendant Bethlehem Steel Company and engaged in making repairs on the S.S. Choloma while it was moored at Pier 2, Hoboken, New Jersey was permanently injured on the 11th day of December 1956, when he fell into an empty molasses tank on such vessel.

The action was originally commenced against United Fruit Company, Agencia Maritima Hondurema, S.A., and Empressa Hondurema de Vapores, S.A. but was dismissed as against United Fruit Company and Agencia Maritima Hondurema, S.A.

The defendant Empressa de Vapores, S.A. filed a third party complaint against Bethlehem Steel Company.

The court submitted the issues to the jury on a special verdict. After the jury returned the verdict, with its answers, the trial court denied all motions of petitioner and ordered judgment dismissing the complaint of the plaintiff against defendant Empressa Hondurema de Vapores, S.A. and likewise dismissed the complaint against the third party defendant.

Petitioner took an appeal to the United States Court of Appeals for the Second Circuit and the judgment was affirmed.

Facts

The statement of facts in the opinion of the court below is generally acceptable to petitioner but to this should be added certain other relevant controlling and undisputed facts which are necessary for the complete and proper evaluation of all of the evidence of the case and the ultimate determination of the law applicable to such evidence.

Petitioner is entitled to judgment upon the record as set forth in the opinion of the court below but such additional undisputed facts demonstrate that petitioner has proven the liability of defendant Empressa independently of the "law of the case" and further that the conclusions of the court below and the trial court are based upon decisions that are not controlling here.

Such additional facts are:

(a) the total Bethlehem contract aggregated only $44,523; the repairs were minor; there was no complete renovation operation (R. 32, 80, 208);

(b) the beams that were being strengthened were behind a bulkhead (R. 32, 208); they were beyond the open tank that caused the accident; the tank was 20

feet below the main deck and could only be reached by going through a hatch about 36 feet square and down a 20 foot ladder (14a);

(c) no work was being done by anyone in the vicinity of the open tank where the accident occurred; there was no work for any Bethlehem employee until *after* he had gone through the opening in the bulkhead.

In this connection the Bethlehem foreman admitted:

"until your men got through that opening they had nothing to do except to get there" (15a).

(d) artificial illumination was required; the generators on the ship were not working, making it necessary to procure lighting current from the shore of which facts defendant had knowledge (R. 225).

Other facts must be considered relative to question "2" of the special verdict relating to the time "the repair personnel first came aboard the ship".

It is likewise a verity in the case:

(a) that the dark and dangerous area through which the Bethlehem employees, including petitioner were compelled to pass to the place behind the bulkhead where the only work was being done, was at all times unlighted with no available facilities on the ship itself and no attempt made by the ship to procure such necessary lighting.

(b) the open tank was a dangerous and unsafe condition (finding of the jury in answer to question "1" of special verdict).

(c) the concession on the record by both counsel can best explain the situation with regard to this opening; (4a)

"that opening was there when Bethlehem started to work; there was nothing calling for Bethlehem covering that opening; was still open, not having been closed, up to and including the time of the accident; and there was nothing there to close it" (4a)

(d) the dangerous condition due to the lack of light and the open tank was inherent in the ship itself;

(e) the ship had notice and knowledge that these dangerous conditions would always be there unless and until Bethlehem might take it upon itself to remedy such conditions;

(f) the danger incident to the lack of light was attempted to be eliminated by temporary means that were insufficient and improper for the simple reason that there was no light at the time of the accident as found by the jury in answer to question "1".

(g) the danger due to the open tank was never eliminated as determined by the jury in answer to question "1".

The material questions submitted to the jury and its answers included

1. Were Mr. Lyon's injuries proximately caused by any unsafe conditions in the area where the accident occurred? Answer: Yes.

2. Was defendant Empressa negligent in that at the time the repair personnel first came aboard the ship, Empressa had not taken reasonable precautions to assure that the plaintiff would have a safe place to work? Answer: No.

4. At the time of the accident, did Empressa have control of the area in which the accident occurred? Answer: No.

Argument

The issues presented relate to the proper construction to be given to Rules 51, 58 and 49 of the Federal Rules of Civil Procedure as applicable to the special verdict returned by the jury in this action after the instructions given it by the trial court.

As to question "1" the charge was:

> "Plaintiff contends that the tank was in an unsafe condition in that the area was not properly lighted and that no safe means had been provided for crossing the opening into which he fell. If you find that this is so and that it was an actual and foreseeable cause of the accident, then you must answer question (1) 'Yes' " (21a).

The jury answered such question "yes' determining that the area

(a) "was not properly lighted" and

(b) "no safe means had been provided for crossing the opening into which he fell".

As to questions "2" and "4" the trial court charged the jury:

> "The law requires that the shipowner must take reasonable precautions to see to it that a worker who comes aboard to repair the ship has a reasonably safe place to work as long as the shipowner maintains control of the area in which the work is being performed." (23a)

At the conclusion of the charge, the trial court at the specific request of counsel for plaintiff told the jury:

> "When I talked to the jury about the obligation of the ship to give the plaintiff a reasonably safe place to work, I meant the entire period of time that the plaintiff was working there, including the time that

he was going into that little opening and coming from it." * * * (37a)

"I think it is clear that the ship had that duty at all times." * * * (38a)

"It was non-delegable" (38a).

No exception was taken to such charge by counsel for defendant nor by third party defendant.

By such charge on the "control" of the ship at the time and place of the accident, the trial court resolved that issue.

Counsel for respondent and counsel for third-party defendant accepted this charge as to "control" by not excepting to such charge.

As a result it became "the law of the case".

Such "law of the case" destroys and nullifies any finding of the jury contrary thereto.

The affirmative finding of the jury in answer to question "1" that the place was unsafe and that it proximately caused the accident and the "law of the case" determining that the ship had "control" at the time and place petitioner was injured requires this court to properly construe this record in accordance with Rules 51, 58 and 49 of the Federal Rules of Civil Procedure and to direct the reversal of the judgment herein with instructions to enter an order that petitioner recover of Empressa Hondurema de Vapores, S.A. the damages awarded by the jury at the trial.

Independently of the "law of the case" the applicable decisions require that judgment be entered in favor of the petitioner herein.

POINT I

The mandatory requirements of Rule 51 Federal Rules of Civil Procedure cannot be nullified by judicial opinion.

Rule 51 of the Federal Rules of Civil Procedure requires counsel to except to the giving of any instruction before the jury retires to consider its verdict.

This rule is mandatory and cannot be nullified by any judicial opinion for the simple reason that counsel must take all exceptions that are believed to be necessary before a case is submitted to the jury so that the trial court can be given every opportunity of presenting to the jury in its charge the precise applicable principles of law in certain, direct, adequate, unequivocal language.

This Court in *Palmer* v. *Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483, has said:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

This Court has recognized the necessity of protecting the rights of litigants in the proper submission of issues to a jury by granting a writ of certiorari for the sole purpose of considering whether Rule 51 of the Federal Rules of Civil Procedure had been complied with.

> *Gibson* v. *Lockheed Aircraft Service Inc.*, 350 U. S. 356, 76 S. Ct. 366.

Petitioner here seeks the enforcement of such rule and the benefits to be derived therefrom and respectfully requests that the opinions of the trial court and the court below be reversed because they are directly in conflict with Rule 51 and the decisions construing the same.

POINT II

The failure of counsel for defendant and third-party defendant to except to the instruction of the trial court to the jury on the basic issue of the case, the control of the ship at the time and place of the accident, made such instruction "the law of the case" and final and determinative of that fact.

At the conclusion of the charge at the insistent request of counsel for plaintiff, the court instructed the jury:

> "When I talked to the jury about the obligation of the ship to give the plaintiff a reasonably safe place to work, I meant the entire period of time that the plaintiff was working there, including the time that he was going along into that little opening and coming from it."

And further:

> "I think it is clear that the ship had that duty at all times."

And further:

> "It was non-delegable."

No objection or exception was made to this charge of counsel for defendant or third-party defendant.

This is the record of the trial that cannot be disputed nor challenged.

Rule 51 of the Federal Rules of Civil Procedure had not been complied with. Counsel had the opportunity to avail itself of the right and privilege of excepting and failing so to do, they must now accept the rule of law known as "the law of the case" that necessarily follows from their own personal conduct.

They themselves "created" the law as to the issue of control as set forth at length and in detail in such charge and they are bound by such instructions and the results flowing therefrom.

By its charge the court itself resolved the issue of control as a matter of law. It determined that the ship had control.

It is the well established and universally adopted rule of law that in the absence of any exception by a party the jury is bound to accept the instructions of the court as "the law of the case".

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* In *Pierce Consulting Eng. Co.* v. *City of Burlington*, 2 C. C. A. 221 Fed. 2d 607:

"No exception was taken to the charge relative thereto, and same, therefore, became the law of the case."

Carver v. *Tanner*, 252 F. 2d 26, at page 31 (8 C. C. A.):

"* * * The appellants took no exception to that instruction and they are in no position to have a review of it here. Rule 51, Federal Rules of Civil Procedure, 28 U. S. C. A." Citing cases.

Grant Storage Battery Co. v. *De Lay*, 87 F. 2d 726, at page 727 (8 C. C. A.):

"In considering the question as to whether the court erred in denying defendant's motion for a directed verdict, the instructions of the court are important because they were not excepted to by either party, and hence became the law of the case." Citing cases.

Chicago Great Western Railway Company v. *Casura*, 234 F. 2d 441, at page 445 (8 C. C. A.):

"* * * No objections having been interposed to the instructions as given, error therein cannot, for the first time, be urged in this court. As the instructions given were not excepted to by either party they became the law of the case." * * *

Baker v. *Chicago, Burlington and Quincy Railroad Co.*, 220 F. 2d 721, at page 725 (8 C. C. A.):

"Neither of these instructions was excepted to. Manifestly, if as contended by plaintiff the amount of the damages was fixed then the instruction that the jury might find '* * * in some amount * * * but not to exceed $6,455.05' was erroneous but not being excepted to it became the law of the case and it cannot now be urged that the jury was bound to find the damage in the amounts now claimed.

In *Swensson* v. *New York Albany Desp. Corp.*, 309 N. Y. 497, 500:

"On this appeal then, we need only consider whether the plaintiffs have established a prima facie case under the law as stated by the Trial Judge. *Since no exception was taken to the charge it became the law of the case.*" (Italics ours.)

In *Brown* v. *Du Frey*, 1 N. Y. 2d 190, 196:

"The act of the Judge in erroneously charging the jury upon the law in the case, although it necessarily results in a verdict not authorized by law, is not an error for which the jury is responsible but is an error of the Judge to be pointed out by an exception and if the party fails to take an exception he cannot raise the question upon a motion for a new trial."

Marcus v. *Boston Edison Co.*, 56 N. E. 2d 910 (Mass.), at 913:

"* * * The judge charged the jury without objection that 'continuously absent means absence for an appreciable length of time'. This ruling became the law of the trial, and with its correctness we need not be concerned." Citing cases.

Lengel v. *New Haven Gas Light Company*, 111 Atl. 2d 547 (Conn.), at page 550:

"* * * However, by their failure to take exception at the conclusion of the charge, the defendants accepted the court's instructions as the law of the case.* * *"

Skoll v. *Cushman*, 13 Atl. 2d 180 (Vt.), at page 181:

"* * * This statement was to the satisfaction of the defendant for he took no exception to it, and so it became the law of the case.* * *"

Loomis v. *Graves*, 77 Atl. 2d 838 (Vt.), at page 840:

"It is likewise in harmony with our holdings that an instruction to the jury, without any exceptions having been taken, becomes the law of the case.* * *"

Bernat v. *De Gasparre*, 129 Atl. 2d 545 (R. I.), at page 546:

"That charge became the law of the case in the absence of exception thereto.* * *"

Hill v. *Carr*, 101 Atl. 525 (N. H.), at page 527:

"* * * The jury were instructed that they could not draw any inference against the plaintiff because she did not testify. This was the law of the trial, and as no exception was taken it became the law of the case. The question is not now open * * *."

Clark v. *Chicago & N. W. Ry. Co.*, 33 N. W. 2d 484 (Minn.), at page 486:

"No exceptions were taken to the above instruction by either party, so it became the law of the case. * * *"

Knutson v. *Lambert*, 51 N. W. 2d 580 (Minn), at page 586:

"There being no exception to this charge by plaintiff, it becomes the law of the case, whether right or wrong * * *."

Rogers v. *Jefferson*, 272 N. W. 532 (Iowa), at page 533:

"No exceptions were taken to the instructions of the court and, whether they are right or wrong, they are the law of the case.* * *"

McClelland v. *Interstate Transit Lines*, 6 N. W. 2d 384 (Neb.), at page 390:

"The instructions given by the trial court are the law of the case, even though they erroneously state the law itself.* * *"

Madison v. *Hood*, 223 N. W. 178 (Iowa), at page 179:

"* * * We have pointed out heretofore that the instructions given by the court in this case were not challenged in any manner or in any particular. The instructions therefore became the law of the case."

Bishop v. *Huffman*, 278 P. 2d 588 (Kan.), at page 589:

"* * * There was no objection to the giving of instructions on that subject or to any instruction as given on that issue. The instructions became the law of the case on the subject." Citing cases.

Braack v. *Bailey*, 200 P. 2d 525 (Wash.), at page 526:

"* * * No exceptions were taken to the instructions given by the trial court. They therefore became the law of the case and are binding upon the parties to this action.* * *"

Brown, et al. v. *Waltrip*, 189 S. E. 342 (Va.), at page 343:

"It does not appear from the bills of exception that objections were made to instructions when given. Therefore they are the law of the case.* * *"

Chancellor v. *Hines Motor Supply Co.*, 69 P. 2d 764 (Mont.), at page 769:

"Instruction 19 embodying the accepted definition of willful negligence was not excepted to by the defendant, and in the absence of such objection became the law of the case." Citing cases.

Montague v. *Burgerhoff*, 102 P. 2d 1031 (Kan.), at page 1034:

"* * * No objection was made to any of the instructions and they became the law of the case." Citing cases.

In considering this issue the court below stated:

> "The trial judge instructed the jury that the ship at all times had a non-delegable duty to give the plaintiff a safe place to work. This instruction, taken in isolation, was unduly favorable to the plaintiff. But he urges that, since no exception was taken, it became the law of the case, requiring us to set aside the jury's findings. While this contention is an ingenious one, we deem its mere statement a sufficient demonstration of its fallacy."

This legal conclusion is wholly incorrect and entirely contrary to Rule 51 and the necessary mandatory interpretation that must follow therefrom.

There can be nothing *fallacious* about any principle of law that has been established by the "law of the case".

The requested charge itself as given by the court became and was and is the only conclusion of law that could be and must be applied as to whether the ship had control of the involved area at the time and place of the accident.

It cannot be termed fallacious when it has been created by the very provisions of Rule 51 and the decisions construing the same.

Whether the charge is right or wrong is wholly immaterial.

As the New York Court of Appeals said in *Brown* v. *Du Frey*, 1 N. Y. 2d 190, 195:

> "*The act of the judge in erroneously charging the jury* upon the law in the case, *although it necessarily results in a verdict not authorized by law* is not an error for which the jury is responsible *but is an error of the Judge* to be pointed out by an exception *and if the party fails to take an exception he cannot raise the question upon a motion for a new trial.*" (Italics ours)

No court can save counsel for defendant and third-party defendant from the "law of the case" that they themselves created.

No court can save the trial court from any charge that it gave to the jury, nor from the effects of such charge.

Whatever was done, was done. It cannot be undone.

The trial court's opinion fails to meet this issue. The instruction in question was given at the conclusion of the charge.

There is nothing in its language that in any wise referred to "the temporary extent of defendant's duty" and there is and can be no interpretation that it did not refer "to the area of control", as the opinion would desire to claim.

The trial court throughout its opinion attempts to justify its order in directing that judgment be entered in favor of the defendant on the verdict.

What the trial court thought or believed was or should be the law as to the basic issue of control during the trial, during the charge or after the verdict of the jury is wholly immaterial and of no consequence and cannot be urged to destroy the rights of the plaintiff.

The final charge was specific, there was no uncertainty in its language, there was no ambiguity in any manner, shape or form.

When the request to charge was made to the trial court, the court was under no obligation to give it.

But once having given it, neither the trial court nor the court below can modify or nullify this charge by any attempted explanation.

The charge speaks for itself. It is definite. It is certain. It is conclusive. It cannot be questioned, even then or now.

It cannot be nullified by any construction by any court.

It is the "law of the case".

POINT III

The answer of the jury to question "4" must be set aside and changed from "no" to "yes" because such finding is a nullity and contrary to the "law of the case" established and made mandatory by counsel for defendant and third party defendant and by the trial court itself.

Question "4" of the special verdict is:

> "At the time of the accident did Empressa have control of the area in which the accident occurred."

The jury answered "no".

It is mandatory for a trial court and an appellate court to change the answer of a jury to any question of a special verdict when it is contrary to "the law of the case" and contrary to law.

The court below recognized that there was such a duty in the event that the contention of plaintiff was correct.

The law and the adjudicated cases sustain this contention of petitioner.

> 89 Corpus Juris Sec. 336.

In *Allstate Insurance Company* v. *Springer,* 269 Fed. 2d 805, 6 C. C. A., judgment had been entered by the court in favor of Springer as a result of a rendition of a special verdict by a jury. However, the Circuit Court of Appeals determined that the facts did not justify the answers of the jury to several questions of such special verdict and set such answers aside as a matter of law.

In the course of the opinion the court said at page 809:

> *"The jury's answers to questions 6 and 7, as drafted must be set aside, and the judgment based upon them necessarily falls."*

Later in reviewing an answer to another interrogatory the court said:

> *"We are of the opinion that a review of the evidence in the light most favorable to appellee, together with all the inferences that justifiably could be drawn therefrom, fails to reveal sufficient evidence of probative value to take this issue to the jury."*

Gary v. *Consolidated Forwarding*, 115 F. 2d 632 at page 634 (7 C. C. A.):

> "* * * This last answer, the trial court changed because not sustained by the evidence."
>
> * * *
>
> "* * * The court properly changed the answer to this question. This, of necessity, resulted in a ten percent reduction of the recovery."

To the same effect:

Haswell v. *Reuter*, 177 N. W. 8 (Wis.);
Vetter v. *Southern Wis. Ry. Co.*, 122 N. W. 731 (Wis.);
Baker v. *Becker*, 141 N. W. 304 (Wis.);
Riger v. *Chicago & N. W. Ry. Co.*, 144 N. W. 204 (Wis.);
Stephenson v. *Wisconsin Gas & Electric Co.*, 202 N. W. 798 (Wis.);
Loehr v. *Crocker*, 211 N. W. 299 (Wis.);
Merkle v. *Behl*, 69 N. W. 2d 459 (Wis.);
Statz v. *Pohl*, 62 N. W. 2d 556 (Wis.);
Hollenbeck v. *Chippewa Sugar Co.*, 144 N. W. 1104 (Wis).

Under the authorities the answer of the jury to question "4" must be changed from "no" to "yes".

POINT IV

The answer of the jury to question "2" must likewise be changed from "no" to "yes".

Question "2" of the special verdict is:

> "Was defendant Empressa negligent in that at the time the repair personnel first came aboard the ship, Empressa had not taken reasonable precaution to assure that plaintiff would have a safe place to work?"

The jury answered "no".

The record must be examined so that the issue can be fully understood.

The trial court in its charge on the issue of control said:

> "The law requires that the shipowner must take reasonable precautions to see to it that a worker who comes aboard to repair the ship has a reasonably safe place to work *as long as the shipowner maintains control of the area in which the work is being performed*" (italics ours) (23a).

The basis of the trial court's determination is set forth in the opinion:

> "The jury found that the accident was caused by an unsafe condition aboard the ship, but that defendant Empressa had not negligently transferred an unsafe vessel to Bethlehem. The jury, which had been instructed that defendant's duty to inspect for and correct dangerous conditions, *existed only so long as it controlled the area in question*, also found that defendant did not have control over the area of the accident at the time of plaintiff's fall" (italics ours) (44a).

The reasoning of the trial court was that as long as defendant Empressa did not have control of the place

where the accident occurred it could not be guilty of any negligence because he claims:

> "*that the shipowner's no non-delegable duty to inspect the ship and correct dangerous conditions, might extend throughout the time when repairs were in progress, but only as long as* defendant retained control of the area in question" (italics ours) (48a).

Or in clearer more definite language, there could be no negligence on the part of the defendant because it did not have control. That there was an unsafe, dangerous and negligent condition at the time and place of the accident has been determined by the jury in answer to question "1" as follows:

> "Were Mr. Lyons' injuries proximately caused by any unsafe condition in the area where the accident occurred?"

The answer of the jury to this question was "yes".

This "unsafe" condition as so found by the jury was explained by the court in its charge wherein it is stated:

> "Plaintiff contends that the tank was in an unsafe condition in that the area was properly lighted and that no safe means had been provided for crossing the opening into which he fell. If you find that this is so and that it was an actual and foreseeable cause of the accident, then you must answer question (1) 'Yes'."

No attempt is made by the trial court to explain this finding of the jury or to get away from its consequences other than by the conclusion that defendant could be held responsible for these dangerous conditions "but only so long as defendant retained control of the area in question." In other words, there was no responsibility for such negligence without control.

The basis of the entire opinion of the trial court was that there could be no liability imposed upon Empressa

because it did not have control at the time and place of the accident.

This as we have stated is entirely contrary to its own charge.

The language of this charge is simple. It requires no explanation. It cannot be contradicted by any attempt by any court to vary its plain decisive language.

As long as the defendant had "control" of the place where the accident occurred as a matter of law under the "law of the case" and such place was unsafe, dangerous and in a negligent condition, the finding of the jury to question "2" becomes and is a nullity.

As the trial court stated, the "control" determined the liability for the negligent conditions.

Question "1", its affirmative answer, and the charge relative thereto is decisive on the negligent condition at the time of the accident which is the only time that is in any wise material.

Furthermore, question "2" and its answer are wholly meaningless. They refer to the time when *"the repair personnel first came aboard the ship"*.

Concededly at that time there were no lights, no proper passageway across the open molasses tank.

What was done to correct this concededly dangerous condition, was done *after the "repair personnel first came aboard the ship"* (language of question "2").

Whether Bethlehem assumed to furnish light and there might have been a temporary lack of light is immaterial as long as Empressa has been and must be held to have been and to be in control of that area because of the "law of the case".

McFall v. *Compagnie Maritime Belge*, 304 N. Y. 314;

Anderson v. *Lorentzen*, 2 C. C. A. 160 Fed. 2d 173.

Bethlehem never made any real attempt to cover the tank opening.

Whatever it may have done in that respect was improperly, insufficiently and negligently done because the jury following the instructions of the court in answer to question "1" found that

> "no safe means had been provided for crossing the opening into which he fell" (charge of the court).

This answer to question "1" based on this instruction necessarily and indisputably proves negligence as to the condition of the tank at the time of the accident.

Certainly no court and no opposing counsel can claim that what was negligence as to the covering of the tank at the time of the accident was not a negligent condition before and at the very time "the repair personnel first came aboard the ship."

The opinion of the court below fails to meet and adroitly avoids the precise issue here presented. The opinion states:

> "While the jury found that an unsafe condition caused plaintiff's injuries it also found that defendant was not responsible for the condition. It evidently considered the cause of the accident to be the temporary failure of Bethlehem's shore current."

There is no discussion in the opinion as to the *second* cause of the accident as determined by the jury itself in considering the unsafe condition under the instructions to question "1".

The charge says:

> "Plaintiff contends that the tank was in an unsafe condition in that the area was not properly lighted *and that no safe means had been provided for crossing the opening into which he fell.*"

Under this charge not excepted to by defendant the jury had the absolute right to determine that

> "no safe means had been provided for crossing the opening"

was one of the causes of the accident regardless of whether any temporary failure of the shore current *might or might not* have been a responsible cause.

Plaintiff is entitled to recover on either basis.

> *Jaffke* v. *Dunham*, 352 U. S. 280, 77 S. Ct. 307;
> *Tammany* v. *Woodbridge Bros.*, 240 Fed. 2d 641, 2 C. C. A.;
> *Varetzis* v. *Luckenbach Steamship Company*, 258 Fed. 2d 78, 2 C. C. A.;
> *Lee* v. *Pennsylvania Railroad Company*, 192 Fed. 2d 226, 2 C. C. A.

If, as the jury has found, there was this dangerous negligent passageway across the tank at the time of the accident, it must have been considerably worse when the "repair personnel first came aboard the ship" because at that time no plank had been placed over the opening as *both the trial court and the court below have determined as a fact that Bethlehem had placed the plank there—there had been none there before.*

There has been no criticism, not even a comment by either court as to the conclusiveness of the factual conclusion of the jury in answer to the first question,

> "that no safe means had been provided for crossing the opening into which he fell" (court charge (21a)).

Under the charge of the court the jury could and did find this condition to be an "unsafe condition".

This charge is likewise the "law of the case" because it was not excepted to.

Here there was "control" by defendant under the "law of the case" and an inherently dangerous "unsafe" condition likewise under the "law of the case" that had been created by the ship itself and which continued from before the "repair personnel first came aboard the ship" up to and at the time that "no safe means had been provided for crossing the opening into which he fell".

This necessary and required determination of the legal issues herein prevents and precludes defendant and third party defendant from claiming that the judgment of the trial court must be sustained.

There is no legal basis for the finding of the jury to question "2" and it must be changed from "no" to "yes".

Both the court below and the trial court *refuse* to consider the essential distinctions.

In *West* v. *United States,* 80 S. Ct. 189, cited by the court below the ship had been brought to Philadelphia for the purpose of extensive repairs to make the ship seaworthy.

There are three necessary distinctions that make that decision inapplicable:

1. in that case there was no question but what the contract or had control (p. 191);

here the "law of the case" determines otherwise; so too, do the other cases hereinafter cited, and discussed.

2. the work that was being done by the contract included the repair of

> "the defective water line and metal plug specially pointed out by petitioner as being defective were listed in the specifications for 'cleansing and repair' and the 'replacement of defective and missing plugs'" (p. 192)

here there was never any agreement on the part of Bethlehem to cover the open tank that caused the accident—the testimony is all to the contrary (4a).

3. "the work of repair in effect creates the danger which makes the place unsafe" (p. 193)

here there was no "work of repair" at the site of the accident; further the work of repair did not "create the danger" which made the open tank unsafe.

The law must be applied to the applicable facts. General statements of law cannot be asserted when the facts fail to warrant such conclusions.

The basis of the decision of the court below is that petitioner has failed to establish

> "that the shipowner's only duty was that of exercising reasonable care under the circumstances."

Counsel for petitioner withdrew the claim of unseaworthiness at the beginning of the trial for two reasons:

(a) because he believed that such a claim might not be warranted because the "type of work" that was being performed by Lyons and the Bethlehem employees was not such "type of work" that was traditionally being done by seamen, the doctrine recognized by this court in *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki,* 358 U. S. 613, 617, 79 S. Ct. 517, 519;

(b) because he obtained from counsel for defendant and third party defendant concessions as to the amount of the contracts involved the contents of such contracts and far more important *a further concession that there was nothing in the specifications requiring Bethlehem to cover the tank opening; that the opening was there at the time Bethlehem started to work, was still open at the time of the accident (an*

admission of negligence) and that there was "nothing there to close it" (4a).

At that time counsel became satisfied that there was sufficient testimony to justify a finding of negligence by a jury because of this admission as to the open tank.

But this failure to assert such probably unwarranted claim of unseaworthiness cannot now be urged as an argument that there was no proof of negligence.

The recent cases are wholly to the contrary:

United N. Y. & N. J. Sandy Hook Pilots Ass'n v. *Halecki, supra;*
The M/V Tungus v. *Skovgaard,* 358 U. S. 588, 79 S. Ct. 503.

The cases cited in the opinion of the court below and the trial court cannot be applied to this case because the *facts* and the issue of *control* are different.

In *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki, supra,* the charge of unseaworthiness was dismissed because the work being done by Halecki and his associate was not the "type of work" traditionally done by seamen.

But the court in its opinion states:

> "The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of the fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use."

In this *Halecki* case, the deceased and his co-worker were in sole control of the work that was being done. They were chosen to do the work because of their skill and

knowledge. The ultimate danger was incident to the work that was being done by these two men. They had charge of the work. They directed its progress. No one interfered with them. They were alone on the ship. No member of the crew was aboard other than the watchman.

Yet with all of these facts present in that case, this Court determined that whether the defendants exercised reasonable care under the circumstances was a question for the jury to determine.

That decision is determinative of the rights of petitioner here. There the court held negligence even without control. Here there is negligence with control by the ship.

Here too defendant Empressa created the original condition. It had knowledge that the place was dark and dangerous. It had actual knowledge that ingress to and egress from the place where work was being done was dangerous unless the ship itself took the necessary precautions to make it safe. The dangers were not created by Bethlehem. The dangers were not incident to the specific work that was being done by Bethlehem. The dangers were not at the specific place where the work contracted for by Empressa was being done.

The dangers were inherent in the place itself—the open tank and the lack of light.

While the other cases cited by both courts are irrelevant and therefore of no consequence, their review will demonstrate that they are wholly inapplicable.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, the plaintiff was injured by the acts of the stevedores and the manner in which they performed their work.

In *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177, recovery was denied because the equipment which brought about the accident was a skid belonging to the stevedores

and because the responsibility for the manner of discharging the cargo was left entirely to the stevedores.

In *Filipek* v. *Moore-McCormack Lines,* 258 F. 2d 734, plaintiff was injured by reason of the latent defect in the rigging of the ship which he had been called upon to inspect. The court determined that there was no proof that defendant had any knowledge of the defect, and the plaintiff was injured by a defect that it was his duty to ascertain and correct, the court saying:

> "The very work in which the servant is engaged makes it unsafe".

In *Long* v. *Silver Line,* 48 F. 2d 15, the court denied liability for the reason that the ship had no control over the work that was being done, and for the further reason that the tank that was being repaired by the workman had to be left open because such condition was necessary for entrance and ventilation in preparation for work.

The conclusions of the court below cannot be sustained.

It states:

> "The jury was justified in concluding that control of this area had been relinquished to Bethlehem." (p. 319)

This determination is contrary to "the law of the case" which is binding on the court below and the trial court.

It states that only employees of Bethlehem were in the vicinity of the molasses tank.

That conclusion is not material.

The condition was inherent in the place itself. It was dangerous and unsafe before the Bethlehem men went aboard the ship and

> "no safe means had been provided for crossing the opening into which he fell"

by either Bethlehem or the defendant.

Independent of control Empressa cannot shut its eyes, do nothing and avoid responsibility for a condition that it knew was there and that could, would and did, cause injury as this Court said in the *Halecki* case *supra*:

> "It was for the triers of the facts to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use." (p. 619)

That Bethlehem may have undertaken to furnish lighting and planks is likewise immaterial.

That was the duty of Empressa because it had control.

Whatever Bethlehem may have done does not relieve Empressa of its responsibilities.

McFall v. *Compagnie Maritime Belge*, 304 N. Y. 314;
Anderson v. *Lorentzen*, 2 Cir., 160 Fed. 2d 173.

The finding of the jury that Empressa was not responsible is contrary to the charge of the trial court, contrary to the "law of the case".

While the inference is permissible that one of the causes of the accident was the temporary failure of Bethlehem's shore current, it is likewise binding upon the Court below that the accident was caused due to the fact

> "that no safe means had been provided for crossing the opening into which he fell."

Empressa is responsible for both conditions because

(a) the dangerous conditions had existed before the repair personnel first went aboard the ship;

(b) such dangerous conditions were inherent in the very place that the Bethlehem men had to use to go back and forth to work as Empressa well knew;

(c) Bethlehem was under no obligation to put any planks over the open tank—Empressa had failed to make any arrangement to protect Bethlehem employees from the dangers incident thereto;

(d) Empressa had control under the "law of the case".

It becomes and is apparent that the "law of the case" is a most important legal factor in this litigation.

The instruction of the trial court that created this "law of the case" could have been refused by the trial court, counsel for defendant and third-party defendant could have excepted thereto but the instruction having been given and no exception having been taken as required by Rule 51, the cited cases affirm the established doctrine of the "law of the case" which cannot be lightly brushed aside by either the Court below nor the trial court.

The issue of control has therefore become and is a moot issue.

It would only be repetitious to discuss the opinion of the trial court.

Suffice it to say that the basis of that opinion has been accepted by the lower court.

Both fail to meet the precise legal issues presented herein.

The decisions sustain the argument of petitioner herein.

In *M/V "Tungus"* v. *Skovgaard,* 353 U. S. 588, 79 S. Ct. 503, this Court accepted the decision of the majority of the Court of Appeals on the issue of negligence.

In that case the employer of Skovgaard had been hired to handle the discharge of cocoanut oil from the motor vessel Tungus. Skovgaard's fellow employees went upon the vessel to carry out the work that they had been hired

to do. During the progress the equipment furnished by the contractor, the pump itself, became defective, resulting in the spillage of oil over the adjacent deck. The pump was stopped and the oil cleaned from its immediate vicinity. Skovgaard, the foreman in charge of the pumping operations, had gone home but he was summoned to assist in the repair work. While walking through an area where the oil had not been removed, he slipped and fell through a partly uncovered tank into hot cocoanut oil resulting in his death.

In the *Tungus* case officers of the ship were aboard and saw what was going on but there the danger that caused Skovgaard's death resulted from defective equipment that his employer brought on the ship and from the manner in which the work was done and from the failure of his co-employers to clean up the oil where the accident occurred.

True there were officers of the ship at the scene of the accident but in the present case, the dangerous condition had existed before any of the Bethlehem employees went aboard the ship. Empressa had knowledge of such condition, knew that it must be corrected, knew it must be made safe before any Bethlehem employee went down through the hatch on the main deck to pass across the open tank that could and did cause the injury to Lyons.

And yet it was conceded by counsel for defendant and third party defendant upon the record at the very beginning of the trial that the tank was open at all times, before and during the entire time that Lyons had to go across it to go to his place of work and that absolutely nothing was ever provided for by Empressa to make this place safe for use (4a).

There is a concession of negligence, of liability once it was proven that it was the cause of the accident, and it was so determined by the jury in answer to question "1".

There is no distinction in the legal concept of notice in the *Tungus* case and the present case. In both cases there was actual notice of the danger that ultimately caused the injury to the plaintiff.

In *Goett* v. *Union Carbide Corporation*, 80 S. Ct. 357, the employer of the deceased had been hired by Union Carbide Corporation to repair one of its river barges. While the deceased was working on the barge he fell off into the river and was drowned.

Liability was predicated upon the failure of Union Carbide to furnish such barge with adequate rescue equipment.

Control had been turned over to the contractor for the making of the repairs but the owner was determined to be responsible for the lack of proper equipment to protect men who had to be on such barge to carry out the repairs they were sent there to do.

The ultimate result in the *Goett* case did not depend upon the issue of control.

In *Pope & Talbot, Inc.* v. *Hawn*, 198 Fed. 2d 800, aff'd 346 U. S. 406, 74 S. Ct. 202, Hawn a carpenter went aboard the ship belonging to defendant to make some repairs. He was hired by the firm that was to make such repairs. While performing his work, he slipped and fell through an unguarded hatch. Recovery was permitted on the grounds of negligence and unseaworthiness. The lower court opinion states:

> "Testimony that the particular area during the critical period was dark and the footing slippery, all contributed to present facts from which the charterer's negligence could be inferred."

In *Badalamenti* v. *United States*, 160 Fed. 2d 422, 2 C. C. A.:

> "We think it was foreseeable that they might have occasion to go to parts of the deck that were not

lighted in pursuit of their calling. If they did, the open hatch was a great danger for it was not protected by any guardrail or ropes, or by any coaming sufficient to prevent an accident. It is not reasonable to suppose that stevedores would not be likely to go about the deck where they were working and not to foresee danger to them from an open hatch which was only about fifty feet away. As a distinguished court said in Pioneer S. S. Co. v. McCann, 6 Cir. 170 Fed. 873, 878: 'it is hardly to be expected that men entering or working within a ship's hold will always keep within the exact parts of the hold where their employment, strictly construed, would call them' " (p. 425).

Other cases may be cited where liability has been predicated upon the failure to place proper guards to prevent an accident such as occurred here.

Beadle v. *Spencer*, 298 U. S. 124;
Lo Bue v. *United States*, 188 Fed. 2d 800;
Luciebello v. *Pope & Talbot, Inc.*, 103 Fed. Supp. 411.

Liability can be predicated independently of the question of control for the simple reason that injuries might be expected from the condition of the open tank unless precautions were taken to prevent them.

The authorities sustain this contention.

In *Blue Ridge Rural Electric Cooperative* v. *Byrd*, 264 Fed. 2d 689, 693 4 C. C. A.

> "and in other decisions the liability of the owner has been held to include injuries that might be expected unless precautions were taken to prevent them". (citing cases including those from other circuit courts)

In *Schwartz* v. *Merola Bros. Construction Corp.*, 290 N. Y. 145:

> "But where from the nature of the work the duty of care in its performance is non-delegable and the

owner is put on notice of the existence of such a dangerous condition, he may properly be held liable to a third party injured by the negligent act of a subcontractor or his employees."

To the same effect:

Gucciardi v. *Chisholm et al.*, 145 Fed. 2d 514 2 C. C. A.;

Person v. *Cauldwell Wingate Corp.*, 176 Fed. 2d 237 2 C. C. A.

Liability can likewise be predicated independently of control because Lyons was compelled to pass through a place that was dangerous in itself and neither he nor his fellow employees were engaged in the very work that created the danger.

This line of cases distinguishes the *Filipek* and those others cited by the court below and the trial court.

In *Dittiger* v. *Isal Realty Corporation*, 290 N. Y. 492, 496:

"(4) Defendant argues that it was under no duty to provide these painters with a safe place to work, since 'no responsibility rests upon an owner of real property to one hurt through a dangerous condition which she has undertaken to fix'. Kowalsky v. Conreco Co., 264 N. Y. 125, 128, 190 N. E. 206, 207. The trial justice charged the rule of Kowalsky v. Conreco Co., but left it to the jury to determine, as a question of fact whether the painting contractor and his men were engaged to do painting work only, or to make necessary repairs to the plaster, also. The testimony did no more than set up a dispute of fact in that regard, and so the charge was correct."

The case of *Paul Admx* v. *Staten Island Edison Corp., et al.*, 2 App. Div. 2d 311 (N. Y.) is precisely in point on the issue here involved.

In that case the deceased was electrocuted while transferring electric wires from an old defective power pole to a new power pole when the old defective pole broke causing the deceased to fall against electric lines resulting in his death. The lower court dismissed the complaint but that decision was reversed upon appeal the court stating the proper applicable law:

> "In the case at bar, the learned Trial Justice held, in effect, that the work in which the intestate was engaged created the danger and, hence, the stated exceptions to the general rules preclude recovery. In our opinion, the work done by him does not come within the purview of the exceptions. *Neither he nor his coworkers were engaged in repairing any defect in the pole. Nor were they engaged in the erection of the dangerous structure. They were simply working upon an existing and completed, albeit unsafe and dangerous, structure. One who is engaged to remove or repair any appurtenance of such a structure may not be said to be engaged in the very work which created the danger.*" (Italics ours.)

In both the *Filipek* and *West* cases the plaintiffs were injured in the progress of the work that they themselves were doing and were obligated to do. They were hired to remove the defective condition that caused the injury to each of them.

No such claim can be made in this case. Lyons was hired to work beyond the tank. None of the Bethlehem employees were hired to cover the open tank.

The concession of counsel at the beginning of the trial furnishes the indisputable proof as to this legal situation.

They admitted that the open tank was there, before and all during the time that the work was being done, that it was open at the time of the accident and there was nothing there to close it (4a).

This, in and of itself, is a binding stipulation which is the equivalent of proof and prevents an independent examination by any judicial officer with respect to such stipulation.

83 Corpus Juris Secundum, Sec. 12, page 30;
Burstein v. *United States,* 232 Fed. 2d 19, 22 8 C. C. A.;
Andrews v. *St. Louis Joint Stock Land Bank,* 127 Fed. 2d 799, 804, 8 C. C. A.;
Moore-McCormack Lines v. *The Esso Camden,* 244 Fed. 2d 198, 2 C. C. A.;
H. Hackfeld v. *United States,* 197 U. S. 442, 447.

Empressa cannot be relieved from responsibility by any alleged attempted delegation of its duty to Bethlehem.

In *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314:

> "That duty (to furnish a reasonably safe place to work)* is nondelegable and the fact that there is a concurrent duty imposed upon the longshoreman's employer to furnish him with a safe place to work does not alter the owner's liability" (citing Federal cases).

As to the open tank there never was any attempt by Empressa to have the tank covered and any such assumption by Bethlehem to do such work was negligently done as found by the jury in answer to question "1".

Neither the court below nor the trial court nor counsel in this case can be heard to rely upon the finding of the jury to question "2" that there was no negligence and any such contention must be wholly disregarded because:

(a) it relates to a time not at all relevant, namely, the time "the repair personnel first came aboard the ship";

(b) it must be conceded that the conditions at that time were unsafe and dangerous because of the

* Parentheses added.

factual finding of the jury in answer to question "1" and the undisputed evidence establishes that there were no lights and no plank over the tank when "the repair personnel first came aboard the ship";

(c) such unsafe and dangerous conditions were inherent in the place itself;

(d) it is a conceded stipulated fact that Empressa made no arrangement with Bethlehem to have the dangerous, open tank covered by Bethlehem;

(e) Empressa at all times retained control of the area and the responsibility therefor as determined by the "law of the case".

There is no factual nor legal basis to sustain the finding of the jury to question "2" and it must be changed from "no" to "yes". The facts and the law require such a determination.

POINT V

Rule 58 of the Federal Rules of Civil Procedure directs that judgment be rendered in favor of the plaintiff on the verdict thus amended by the change of the answer to question "4" from "no" to "yes" and the answer of question "2" from "no" to "yes".

Rule 58 F. R. C. P. states:

"but the court shall direct the appropriate judgment to be entered upon a special verdict".

The verdict thus amended determines:

Question 1. that the plaintiff's injuries were proximately caused by the unsafe condition in the area where the accident occurred;

Question 2. that Empressa was negligent in failing to take proper precautions to prevent the unsafe condition in the area where the accident occurred;

Question 4. that Empressa had control of the area in which the accident occurred;

Question 6. that the reasonable value of Lyons' damages was $30,000;

Question 7. (a) that the negligence of plaintiff contributed to the accident; and

Question 8. (b) that the negligence of the plaintiff contributed 25% to the accident.

With these changes to the answers to the special verdict the liability of defendant is established in the amount determined by the jury.

Arnold v. *Panhandle & S. F. Ry. Co.*, 353 U. S. 360, 77 S. Ct. 840;
Allstate Insurance Company v. *Springer*, 269 Fed. 2d 805, 6 C. C. A.

So too must judgment be entered in favor of petitioner because of the finding of the jury to question "1", the instructions given in connection therewith and the "law of the case".

POINT VI

Rule 58 of the Federal Rules of Civil Procedure is mandatory and cannot be disobeyed or circumvented by any interpretation that may be placed by any court to the proper answer to a special verdict.

The determination of the issues by the court below cannot be sustained.

It is based entirely upon factual concepts that are entirely contrary to the verdict as amended.

There is nothing fallacious about the well established and universally adopted doctrine of the "law of the case".

The doctrine is specially applicable here. It covers and refers to the basic right of the plaintiff to recover under the record that has been made at the trial below.

That record cannot be changed.

So too is the trial court bound by the instructions that he gave to the jury which became the "law of the case".

The trial court cannot attempt to interpret any instruction after it has been given to a jury.

POINT VII

Rule 49 of the Federal Rules of Civil Procedure is mandatory and must be enforced.

Rule 49 provides:

> "When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers."

There is no general verdict in this case thus requiring that the court to "direct the entry of judgment in accordance with the answers".

The verdict as amended is set forth in Point V to which reference is made.

There is no inconsistency in such verdict and the court must therefore direct judgment on such questions and answers.

There can be no suggestion that there is no question to question "3" for the very simple reason that it has been answered by the jury at question "1", namely, that the injuries to plaintiff were

> "proximately caused by the unsafe condition in the area where the accident occurred."

Even without considering questions "2" and "4" and their answers petitioner is entitled to judgment herein because of the answer of the jury to question "1", the instructions relative to such question and the "law of the case".

POINT VIII

Under Rules 51, 58 and 49 of the Federal Rules of Civil Procedure as applied herein the judgment entered by virtue of the trial court, affirmed by the court below must be reversed.

Further discussion is unnecessary.

There can be no justification for any judgment in favor of defendant Empressa.

The petitioner is entitled to judgment on the record for the amount of damages determined by the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

JACOB RASSNER and
HENRY ISAACSON,
Attorneys for Petitioner.

JACOB RASSNER,
THOMAS F. FRAWLEY,
of Counsel.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 40—October Term, 1959.

(Argued November 6, 1959 Decided December 18, 1959.)

Docket No. 25642

—o—

JOHN LYONS,

Plaintiff-Appellant,

v.

EMPRESSA HONDURENA DE VAPORES, S.A.,

Defendant-Appellee,

v.

BETHLEHEM STEEL COMPANY,

Third-Party Defendant-Appellee.

—o—

Before:

CLARK, HINCKS, and WATERMAN,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

John Lyons appeals from a judgment for defendant Empressa Hondurena de Vapores, S.A., in his action for damages for personal injuries sustained while working aboard defendant's vessel, the S/S Choloma, as an employee of Bethlehem Steel Company, the third-party defendant. The

judgment was entered upon a jury's special verdict, which the court sustained in an opinion, D. C. S. D. N. Y., 170 F. Supp. 261. Affirmed.

THOMAS F. FRAWLEY, New York City (Henry Isaacson and Jacob Rassner, New York City, on the brief), *for plaintiff-appellant.*

JOHN P. CARSON, New York City, *for defendant-appellee.*

FRANK A. BULL, of Mendes & Mount, New York City, *for third-party defendant-appellee.*

CLARK, *Circuit Judge:*

Plaintiff, an iron worker in the employ of Bethlehem Steel Company, brought this action for damages for personal injuries sustained in a fall aboard defendant's vessel, the S/S Choloma. Jurisdiction is based on the diverse citizenship of the parties, and claim over was made by defendant against Bethlehem as third-party defendant. At the time of the injury the vessel was at Bethlehem's shipyard in Hoboken, New Jersey, in order to have a number of deck beams renewed. The location where these repairs were to be effected could be reached only by crossing an open molasses tank in the vessel's 'tween deck. In order to afford its employees a means of ingress and egress, Bethlehem placed a twelve-inch plank across this opening and it also installed temporary electric lights to illuminate the area. These lights were connected by cable to Bethlehem's shore current.

On the morning of the accident plaintiff crossed the plank and walked three or four feet to a hole in the bulkhead through which he crawled to reach his place of work. At this time the tank area was adequately illuminated. Plaintiff completed his work about 11:00 a. m. and proceeded to return to the deck. He crawled through the hole in the

bulkhead, took a step forward, and fell about nine feet to the floor of the open tank. Both he and a co-worker testified that the area was then dark except for the slight illumination which emanated from a small hatch about twenty feet above and on the other side of the tank. They also testified that the plank was not then in place. Another employee testified that several minutes prior to the accident he had crossed the plank, which was then well lighted. He further stated that several minutes after the accident the plank was in the same position and the lights were lit.

The issues were submitted to the jury for a special verdict on interrogatories.[1] The jury found that the injuries were caused by an unsafe condition, but that defendant was not negligent in failing initially to assure plaintiff a safe place to work and that defendant did not have control of the area at the time of the accident. Writing a reasoned opinion, D. C. S. D. N. Y., 170 F. Supp. 261, Judge Kaufman directed the entry of judgment upon this verdict and plaintiff appeals.

Plaintiff contends that defendant had an absolute duty to furnish a safe place to work. It is clear, however, that the shipowner's only duty was that of exercising reasonable care under the circumstances. *West* v. *United States,* S. Ct.,

---

[1] The questions submitted to the jury and its answers included:

1. Were Mr. Lyons' injuries proximately caused by any unsafe condition in the area where the accident occurred? Answer: Yes.

2. Was defendant Empressa negligent in that at the time the repair personnel first came aboard the ship, Empressa had not taken reasonable precautions to assure that the plaintiff would have a safe place to work? Answer: No.

* * *

4. At the time of the accident, did defendant Empressa have control of the area in which the accident occurred? Answer: No.

Dec. 7, 1959; *United New York and New Jersey Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, 618. Indeed, plaintiff seems to have recognized this principle when he withdrew a claim of unseaworthiness at the trial. The trial judge instructed the jury that the ship at all times had a nondelegable duty to give the plaintiff a safe place to work. This instruction, taken in isolation, was unduly favorable to the plaintiff. But he urges that, since no exception was taken, it became the law of the case, requiring us to set aside the jury's findings. While this contention is an ingenious one, we deem its mere statement a sufficient demonstration of its fallacy.

The only remaining question is whether the jury's findings are supported by the evidence. Although either the chief officer or the captain was aboard at the time of the accident, only Bethlehem employees were shown to be in the vicinity of the molasses tank. The jury was certainly justified in concluding that control of this area had been relinquished to Bethlehem. See *Filipek* v. *Moore-McCormack Lines*, 2 Cir., 258 F. 2d 734, 737, certiorari denied 359 U. S. 927; *Gallagher* v. *United States Lines Co.*, 2 Cir., 206 F. 2d 177, 179, certiorari denied 346 U. S. 897. In any event Bethlehem undertook to supply the lighting and planks. See *Long* v. *Silver Line*, 2 Cir., 48 F. 2d 15. While the jury found that an unsafe condition caused plaintiff's injuries, it also found that defendant was not responsible for the condition. It evidently considered the cause of the accident to be the temporary failure of Bethlehem's shore current. This conclusion was certainly permissible, if not required by the evidence. Plaintiff's rights against Bethlehem were exclusively under the compensation statute, and the third-party claim against it of course falls with the judgment in favor of the shipowner.

Judgment affirmed.

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(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the Eighteenth day of December, one thousand nine hundred and Fifty-Nine.

Present:

HON. CHARLES E. CLARK
HON. CARROLL C. HINCKS
HON. STERRY R. WATERMAN
Circuit Judges

JOHN LYONS,

Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY, Agencia Maritima Hondurena, S. A., and Empressa Hondurena de Vapores, S. A.,

Defendants-Appellees,

AND

AGENCIA MARITIMA HONDURENA, S.A., and EMPRESSA HONDURENA DE VAPORES, S.A.,

Third-Party Plaintiffs-Appellees,

v.

BETHLEHEM STEEL COMPANY,

Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed; with costs to the Defendant-Appellee.

A. DANIEL FUSARO,
Clerk.

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Supreme Court of the United States

BEATRICE LYONS, temporary administratrix, with limited authority of the goods, chattels and credits of JOHN LYONS, deceased,

Petitioner,

against

UNITED FRUIT COMPANY, AGENCIA MARITIMA HONDURENA, S.A., and EMPRESSA HONDURENA de VAPORES, S.A.,

Respondents,

and

AGENCIA MARITIMA HONDURENA, S.A., and EMPRESSA HONDURENA de VAPORES, S.A.,

Third-Party Plaintiffs,

against

BETHLEHEM STEEL COMPANY,

Third-Party Defendant.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

The petition for certiorari herein seeks a review by this Court of a judgment entered in the United States District Court for the Southern District of New York on a special verdict of a jury, which judgment was affirmed by the Court of Appeals for the Second Circuit. Although the complaint was dismissed as against defendants United Fruit Company and Agencia Maritima Hondurena, S. A.,

(Petition, p. 4), their names are continued in the caption of the petition; and, for conformity, we have used the same caption. In fact, however, the only parties now in the litigation are the petitioner (plaintiff), respondent Empressa Hondurena de Vapores (defendant) and respondent Bethlehem Steel Company (third-party defendant).

Believing the judgment and decisions were correct, the defendant and the third-party defendant in the trial court join in this brief in opposition to certiorari. They both submit that there is no constitutional or legal question involved, and no conflict in decisions warranting further review by this Court. The petitioner's argument appears to be that the jury was wrong, and if her attorneys amend the verdict in her favor, the judgment should be reversed. We do not know of any case in which this Court has allowed attorneys to amend a jury's verdict in order to support a different, more favorable judgment.

The complaint originally claimed unseaworthiness of the ship, the S/S "Choloma," and negligence of her owner; but the plaintiff withdrew the claim of unseaworthiness (53a, Petition, p. 25) and the trial proceeded on the issue of negligence of the shipowner.

Opinions Below

The opinion of the trial court is reported in 170 F. Supp. 261, with an appendix setting out the questions submitted to the jury for its special verdict and the jury's answers (170 F. Supp. at p. 266).

The opinion of the Court of Appeals is reported in 273 F. 2d 317, and is also set out in the appendix to the petition for certiorari.

Questions Involved

The petitioner states that the questions presented by the petition (pp. 2-3) are with respect to the authority of the trial court to grant judgment on the special verdict of the jury, notwithstanding Rules 51, 58 and 49 of the Federal Rules of Civil Procedure.

It is our opinion that the only question involved is whether a trial court or an appellate court should change, or disregard, a jury verdict properly based on the evidence in the case, and grant judgment contrary to such verdict. Certainly that is not required by any of the rules on which petitioner professes to rely.

Statement

Briefly, the facts involved in this case are stated in the opinion of the District Court (170 F. Supp. 261) and the opinion of the Court of Appeals (273 F. 2d 317). Except in one minor respect we agree with the following statement in the District Court's opinion:

> "This action was brought by plaintiff to recover for personal injuries he sustained while working aboard defendant's vessel, the S/S 'Choloma,' as an employee of Bethlehem Steel Company, the third party defendant. On December 11, 1956, the day of the accident, the ship was tied up at Bethlehem's Hoboken, New Jersey shipyard for repairs. Plaintiff, an iron worker, was assigned to work in the port wing of the ship's large molasses tank. In order to leave the port wing, plaintiff had to pass over or near a large opening of the tank in the tween deck. The accident occurred when plaintiff slipped into this opening and fell 10-15 feet to the floor of the tank, sustaining injuries.
>
> • • • •

"Although plaintiff originally also sought to recover under the doctrine of unseaworthiness, this theory was not pressed and was abandoned by plaintiff at the trial.

"Defendant Empressa impleaded the Bethlehem Steel Company, the plaintiff's employer, claiming the right to indemnity arising out of the agreement to repair the involved portion of the ship" p. 262.

The statement in that opinion that is not wholly accurate is that the plaintiff "slipped." There is no evidence that he slipped into the opening, but his own testimony was that he stepped into it (7a, 10a, 57a, 58a, 59a).

The facts were stated by the Court of Appeals as follows:

"Plaintiff, an iron worker in the employ of Bethlehem Steel Company brought this action for damages for personal injuries sustained in a fall aboard defendant's vessel, the S/S Choloma. * * * At the time of the injury the vessel was at Bethlehem's shipyard in Hoboken, New Jersey, in order to have a number of deck beams renewed. The location where these repairs were to be effected could be reached only by crossing an open molasses tank in the vessel's 'tween deck. In order to afford its employees a means of ingress and egress, Bethlehem placed a 12 inch plank across this opening and it also installed temporary electric lights to illuminate the area. These lights were connected by cable to Bethlehem's shore current.

"On the morning of the accident plaintiff crossed the plank and walked three or four feet to a hole in the bulkhead through which he crawled to reach his place of work. At this time the tank area was adequately illuminated. Plaintiff completed his work about 11:00 a. m. and proceed to return to the deck. He crawled

through the hole in the bulkhead, took a step forward, and fell about nine feet to the floor of the open tank. Both he and a co-worker testified that the area was then dark except for the slight illumination which emanated from a small hatch about twenty feet above and on the other side of the tank. They also testified that the plank was not then in place. Another employee testified that several minutes prior to the accident he had crossed the plank, which was then well lighted. He further stated that several minutes after the accident the plank was in the same position and the lights were lit.

"The issues were submitted to the jury for a special verdict on interrogatories. The jury found that the injuries were caused by an unsafe condition, but that defendant was not negligent in failing initially to assure plaintiff a safe place to work and that defendant did not control the area at the time of the accident."

Petitioner also agrees with the facts stated by the Court of Appeals (Petition, p. 5) but suggests that other alleged "controlling and undisputed facts" should be added. We do not agree that the alleged additional facts are controlling, and they are not all undisputed. The first fact suggested by petitioner as "controlling" is with respect to the extent of repairs to the ship involved. Seaworthiness is not involved in the action, and the extent of repairs has no bearing on the sole issue of the case, i.e., negligence of the shipowner.

The next fact claimed by petitioner to be "controlling" is that the repair work was performed "behind a bulkhead" and "beyond the open tank that caused the accident" (Petition, p. 5). Such a claim ignores the fact that the whole area was *one tank* in parts of which there was decking twenty feet down from the top (a sort of 'tween deck), and that the area "behind a bulkhead" was merely

one of the wings of the tank at that level. The bulkhead referred to was a "swash bulkhead", the purpose of which was to retard sudden shifting of a molasses cargo when rolling in seas (53a-54a).

What petitioner referred to as the "open tank" is merely a part of the tank which does not have any decking at that level. The bottom of the tank is around nine feet below the decking referred to (14a), but the ladder by which one enters the tank extends from the top (at the main deck), through the opening referred to, to the bottom of the tank (72a).

At page 6 of the petition other matters are stated as "verities", but they are mostly arguments. One alleged "verity" is that the open area "was at all times unlighted." That cannot be called undisputed, because it is a misstatement, contrary to the evidence. The plaintiff himself, as well as his only witness, testified that the area was lighted at the time they went into the tank (10a, 11a, 12a, 55a, 8a, 9a). The testimony of the repairmen was that it was lighted, at least up to a few minutes before the accident (67a, 72a, 73a, 74a). There is no evidence that it was not lighted at all times except possibly when the plaintiff and his helper proceeded to leave the tank.

Petitioner repeatedly refers (Petition, pp. 22, 28, 29) to the trial judge's explanation to the jury, that plaintiff claimed that no safe means had been provided for crossing the opening into which he fell (21a), as a charge of what the actual facts were. It is proper for a judge to point out *the claims* of the parties, but it is for the jury to decide *the facts*, and that was what was done in this case. The court did not tell the jury what facts to find.

ARGUMENT

POINT I

The judgment below conforms to the rules cited by petitioner and is not contrary to, nor inconsistent with, those rules.

Petitioner's argument seems to be that respondents "created the law of the case" by not excepting to the trial court's instructions to the jury. At page 11 of the petition it is stated "they themselves 'created' the law as to the issue of control;" and this argument is repeated at pages 16 and 4. At page 17 it is stated that respondents "established and made mandatory" such law. Perhaps we should be flattered, but in all modesty we are compelled to concede that we do not have such power.

In any event the jury returned a verdict that the shipowner was not in control of the area involved and was not negligent. It is the jury's verdict that is under attack by petitioner; and that verdict being based on the evidence and "the law of the case," there is nothing to review.

Petitioner's unsound argument is claimed to be based on Rule 51 of the Federal Rules of Civil Procedure which provides that a party may not "assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires." Petitioner's argument ignores the fact that respondents are not assigning any error to the court's instruction, which as the Court of Appeals said "was unduly favorable to the plaintiff." It was on that favorable charge that the jury found for the defendant.

There is nothing in Rule 51 which empowers counsel to usurp the powers of the legislature and the courts. It merely provides that one who does not except to a charge, cannot attack that charge later. Respondents are not

attacking the charge of the court; it is the petitioner who is attacking the findings of the jury based on the court's charge. As the Court of Appeals said of this argument, "its mere statement (is) a sufficient demonstration of its fallacy."

It is interesting to note that although plaintiff objects to the findings of the jury, she concedes that "the jury had the absolute right" to determine the issue in her favor. Of course it had such right, but it did not so find. We do not agree that although the jury had the right to find for the plaintiff, it did not have the right to find for the defendant on the evidence.

Petitioner not only undertakes to benevolently bestow power on respondents to create law, but also takes unto herself power to amend the jury's verdict (Petition, pp. 37-38-39). The petition points out that by amending the verdict, petitioner is entitled to judgment. This purports to be based on Rule 58, which provides that "the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by the jury pursuant to Rule 49." That was done in this case, but petitioner argues that with *her amendments* of the verdict she should be awarded a judgment.

Petitioner also argues that the judgment below does not comply with Rule 49 which provides that when answers are consistent with each other but one or more is inconsistent with a general verdict, the court may direct the entry of judgment in accordance with the answers. That has no application whatever to the case now before this Court, as there was no general verdict. This case was submitted to the jury for a special verdict under section (a) and not for a general verdict in addition to interrogatories under section (b).

POINT II

The judgment below is in conformity with the decisions of this Court and the lower courts, and there is no inconsistency.

It would seem unnecessary, but we will refer to a few of the cases in point which are consistent with, and uphold, the judgment and the jury verdict which petitioner seeks to attack.

In *West* v. *United States,* 361 U. S. 118, 121-4, 80 S. Ct. 189, 191-3, this Court affirmed a denial of recovery in a repairman's suit claiming both negligence and unseaworthiness. As the present petition does not involve any question of seaworthiness, we will quote only from this Court's opinion on the claim of negligence:

> "• • • In addition, petitioner claimed that the United States was liable for negligence in not maintaining a safe place for him to work, a duty asserted to be non-delegable and absolute.
>
> "• • • Furthermore, he (libelant) took his orders from the contractor, not the shipowner. He knew who was in control. • • •
>
> "In presenting his alternative ground of recovery, the petitioner has a dual theory. He first says that the duty to furnish a safe place to work is a non-delegable duty, the violation of which does not depend on fault. If unsuccessful in this position, he insists that respondent's failure to keep the water plug tight was negligence.
>
> "• • • Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work. But we do not believe that such a duty was owed under the circumstances of this case. Petitioner

> overlooks that *here the respondent had no control over the vessel or power either to supervise or to control the repair work* on which petitioner was engaged. *We believe this decisive against both aspects of plaintiff's dual theory.* * * * It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent, having hired Atlantic to perform the overhaul and reconditioning of the vessel—including the testing—was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. The Courts of Appeals seem to have followed this rule. See Filipek v. Moore-McCormack Lines, 2 Cir., 258 F. 2d 734. Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers. * * * *Any culpability here could be chargeable only to the contractor, not to the shipowner.* * * *But here the owner had no control of the ship; it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner.*" (Italics supplied)

The situation in the case now before this Court is very similar to that in the *West* case, insofar as any claim of negligence of the shipowner is concerned. As in *West*, this petitioner claims that the shipowner was liable for negligence in not maintaining a safe place for him to work and that such a duty was non-delegable and absolute. But as pointed out by this Court such liability would not attach because the shipowner had no "power either to supervise or control the repair work on which petitioner was engaged."

In *Filipek* v. *Moore-McCormack Lines,* 258 F. 2d 734, 737, referred to by this Court in the *West* opinion, and in which this Court had denied certiorari (359 U. S. 927, 79 S. Ct. 605), the Court of Appeals for the Second Circuit said:

> "It is likewise clear that the plaintiff's charge that the defendant was negligent in failing to see that work was done safely is without merit. While certain of the ship's officers were present during the testing of the equipment, it is apparent that they were there not to direct the work or to participate in it in any way, but merely as observers. The work of Filipek, and the other Eastern employees was actually supervised by Eastern's foremen. No orders were in fact given by any of the ship's officers. The mere presence of some of the ship's officers placed no duty on Moore-McCormack to see that the work was being done in a safe manner by Eastern's employees."

In the case now before this Court, unlike in the *Filipek* case, there was no one in the molasses tank except the shipyard employees (59a, 71a).

In *United N. Y. & N. J. Sandy Hook Pilots' Ass'n.* v. *Halecki,* 358 U. S. 613, 618-19, 79 S. Ct. 517, 520, a ship was undergoing annual overhaul, one of the items of work being the dismantling and overhauling of the ship's generators, which required that they be sprayed with a toxic compound. The shipyard had sub-contracted the electrical work to the employer of plaintiff's decedent. The decedent died as a result of inhaling some of the toxic compound which he was using, and the action was brought on the ground of unseaworthiness and negligence. This Court said with respect to the negligence claim:

> "As to the claim based upon negligence, * * * we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a ver-

> dict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. *It was for the triers of fact to determine whether the defendants were responsibly negligent* in permitting or authorizing the method or manner of its use." (Italics supplied)

In the case now before this Court the issue of the shipowner's negligence was left to "the triers of the fact," and they determined that the shipowner was not negligent. Petitioner seems to argue that the question of control should not have been left to the jury, and its finding of no negligence on the part of the shipowner should be set aside. In *Halecki,* however, this Court said that the evidence at the trial "created an issue that could be decided" *only* by a verdict.

In *Gallagher* v. *United States Lines Co.* (C. A. 2), 206 F. 2d 177, 179, cert. den. 346 U. S. 897, 74 S. Ct. 221, rehearing den., 346 U. S. 940, 74 S. Ct. 375, the plaintiff's intestate was a longshoreman assisting in discharging cargo from the defendant's vessel. He was struck by a bale of cargo which fell from an aeroplane skid which belonged to his employer. The Court of Appeals reversed a judgment for the plaintiff and directed judgment in favor of the defendant shipowner, in the course of its opinion saying:

> "Thus, a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work. • • • Viewed in perhaps another way, United [shipowner] owed a duty to [plaintiff], a business visitor, but *this duty would not*

extend to conditions and activities over which United had no control." (Italics supplied)

As pointed out above, certiorari was denied in that case, but petitioner asks this Court to grant certiorari and review the decisions of the lower courts in this case on the alleged ground that the shipowner's duty extended to activities in the molasses tank which had been turned over to the shipyard workers and over which the shipowner had no control, a fact found by the jury.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre* (C. A. 2), 213 F. 2d 397, there were employees of the shipowner present at the place of the accident (unlike in the case at bar) but the court found that those employees were not concerned in the manner in which the work was being done by plaintiff and his fellow longshoremen, saying:

> "We are clear that since details of the operation was left to American [the stevedore], Cyprien [shipowner] cannot be held for negligence in the latter's performance.
>
> * * * *
>
> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (p. 400)

In *Long* v. *Silver Line* (C. A. 2), 48 F. 2d 15, 16, a shipyard worker sued to recover for personal injuries sustained on a ship. As in the case at bar, there were no lighting fixtures in the work area, and two days before the accident the shipyard installed portable lights for use there. In affirming a dismissal as against the shipowner, the Court of Appeals said:

> "The fault of the ship, if any, was in failing to supply a light in the between-decks. * * * The ship had no

> control over the order of the work. * * * Although the [repairer's] contract said nothing as to who was to supply the lighting, it had *voluntarily undertaken to do so. No one asked, or expected, the ship to furnish the lights.* * * * Under the circumstances the utmost duty that the [shipowner] could have owed [libelant] was to warn him that it would be dangerous to walk about the between-decks in the dark. * * * Although work had not begun upon tank No. 4, we think the District Court correctly found that all four tanks and the between-decks of hatch No. 3 *were under the control of [the repairer], and correctly held that the [shipowner] was free from negligence.*" (Italics supplied)

Among other cases holding that a shipowner having no control over the work being done is not liable for failure to furnish a safe place, are *Lopez* v. *American Hawaiian Steamship Co.* (C. A. 3), 201 F. 2d 418, 420; *Pedersen* v. *The Bulklube* (E. D. N. Y.), 170 F. Supp. 462, 465-6; *Latus* v. *United States* (E. D. N. Y.), 170 F. Supp. 837, 841; *Lyon* v. *United States* (E. D. N. Y.), 163 F. Supp. 206, 208, aff'd. 265 F. 2d 219. In the latter case the Court of Appeals for the Second Circuit said:

> "In the absence of power to supervise or control the work, the shipowner cannot be held negligent."

The shipowner is not an insurer. *Phipps* v. *N. V. Nederlandsche Amerikaansche, S. M.* (C. A. 9), 259 F. 2d 143, 145; *Barbazon* v. *Bellships Co.* (C. A. 3), 202 F. 2d 904, 906; *Freitas* v. *Pacific-Atlantic Steamship Co.* (C. A. 9), 218 F. 2d 562, 564.

In *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 632, 79 S. Ct. 406, 410, this Court said that the duty of the owner of a ship in navigable waters to those legitimately on board is one of *exercising reasonable care under the circumstances of each case.* Control is neces-

sarily an important element or circumstance in the issue of "reasonable care." It would be unreasonable to find culpability in one who has no power of control. The jury in this case found that the shipowner did not have control of the area where, and at the time, the decedent walked into the opening which was known to him (55a), and that it was not negligent. The jury found such facts from the evidence before it, and it is not the province of an appellate court to change such jury findings if there is any evidence supporting them.

CONCLUSION

The judgment below was properly based on a jury verdict and the petition for certiorari should be denied.

Respectfully submitted,

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